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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 77.

HARRIET C. BINNEY, FREDERIC CUNNINGHAM, AND CONSTANCE C. PERTZOFF ET AL., *Appellants*,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPELLANTS' BRIEF.

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v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPELLANTS' BRIEF.

BRIEF SUMMARY OF CASE.

The appellants are the heirs at law of Hetty Sullivan Lawrence Cunningham, intestate, late of Brookline, Massachusetts, and the trustees and certain beneficiaries of three trusts in which the intestate had a life interest. The trusts were as follows:

a) The 1862 trust—created by the intestate's father *inter vivos*, the intestate being given a general testamentary power of appointment (R. 19-21).

b) The 1877 trust—created by the intestate, reserving a life interest to herself, giving remainders to her children and others, and reserving no power of appointment and no power to revoke, alter or amend (R. 4-6).

c) The 1891 trust—created by the will of the intestate's mother, under which the intestate had a narrowly limited testamentary power of appointment (R. 6-16).

At the effective dates of all these instruments no Massachusetts statute imposed any tax upon the succession of lineal descendants.

This case involves inheritance taxes assessed by the appellee under color of GENERAL LAWS (Ter. Ed.), chapter 65, sections 1 and 2, upon the several shares of the heirs and beneficiaries in the trust premises of those three trusts. The powers of appointment in the 1862 and 1891 trusts were not exercised, since the decedent left no will, and all succession to interests in each of the three trusts occurred as provided by the original instruments. In assessing these taxes the appellee united the interests of the beneficiaries in the trusts with their interests in the intestate's own property received through inheritance. This method of assessment, in so far as it raised the rate of tax and caused the taxation of shares otherwise exempt, and the levy of any taxes upon the successions under the trusts, are contested by the appellants as being repugnant to the Constitution of the United States. The constitutional questions were duly raised in the state courts and there decided adversely to the appellants' contentions.

[See for further statement of the case, *infra*, pp. 3-12.]

THE OPINION OF THE COURT BELOW.

The decree sought to be reviewed was entered on January 20, 1936, in the Probate Court for the County of Norfolk, pursuant to a rescript from the Supreme Judicial Court of Massachusetts. The opinion of the Supreme Judicial Court, in accordance with which the rescript was issued, is not yet officially reported, but has been printed in Mass. Adv. Sh. (1936) 153, and in 199 N.E. 528.

THE JURISDICTION OF THIS COURT.

In a petition for the abatement of the Massachusetts succession taxes assessed upon the appellants' interests in the

three trusts, the appellants asserted that the statutes imposing the taxes, as construed by the state taxing authorities, deprived them of their property without due process of law and denied them the equal protection of the laws in violation of the Constitution of the United States (R. 3). By final decree, filed January 20, 1936, the highest court of the state having jurisdiction dismissed the petition, pursuant to a rescript from the Supreme Judicial Court which incorporated an opinion of that Court expressly sustaining the validity of the statutes as applied.

Under the provisions of the Act of January 31, 1928 (45 Stat. 54; U.S.C. Title 28, §861a), as amended by the Act of April 26, 1928 (45 Stat. 466; U.S.C. Title 28, §861b), the present appeal is brought in lieu of a writ of error. The appeal was allowed by the state court by order entered April 17, 1936.

A full statement as to jurisdiction has been heretofore filed with this Court in compliance with paragraph 1 of Rule 12, and reference to that statement is made for a discussion of the statutory requirements of jurisdiction. On June 1, 1936, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. The appellants believe that novel and substantial questions are presented by this appeal. These questions are set out in the statement of the case and are treated at length in the sections of this brief devoted to the argument.

Statement of the Case.

The 1862 Trust.

In 1862 Amos A. Lawrence paid a sum of money to the Massachusetts Hospital Life Insurance Company, a Massachusetts corporation, and the Company agreed, by a written contract dated July 24, 1862 (R. 19-21), to hold the fund

upon terms summarized as follows by the Supreme Judicial Court (R. 25):

> "In 1862, Amos A. Lawrence, the father of the intestate, created a trust for her benefit, which was accumulated until 1877, and thereafter the income was paid to her during her life. At her death, the principal and unpaid income were to be distributed to such persons as she might by will appoint and, in default of appointment, to her surviving children." (See exact language of contract (R. 21). The provision for accumulation is explained in the footnote to this page.)

The 1877 Trust.

In 1877 Hetty Sullivan Lawrence conveyed to her father and to Francis W. Lawrence certain property upon trusts declared in an indenture dated January 26, 1877 (R. 4-6), described by the Supreme Judicial Court as follows (R. 25):

> "Its pertinent terms were these: She reserved to herself only a life estate of the net income but no power to revoke, alter, or amend. From and after her death, for twenty years, the net income was payable by quarter-

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The accumulation of the income was by virtue of this provision in the contract (R. 21):

> "It is agreed that the said Hetty when of age, and during her minority her Father or Guardian, shall have liberty to have one or more of said annual payments added to said principal Sum (in order to increase said principal Sum) giving the Company notice of their intention at least sixty days before the annual time of paying said interest."

Hetty Sullivan Lawrence, the life beneficiary, came of age on December 31, 1875 (R. 18), and thereafter the determination in respect to the accumulation of the income was her own. For two years thereafter income was accumulated in the aggregate amount of $2030.13 (R. 18).

yearly payments in equal shares 'to and among such of' her children as 'may be living at the time of payment,' living issue of a deceased child to take by right of representation. At the expiration of the twenty years after the death of the intestate, the trustees were to make division of the principal of the trust equally among her children then living, the issue of any deceased to take by right of representation with the provision that, if at her death or at any time during the twenty years next thereafter no child or issue of the intestate should be living, the trustees should transfer the principal of the trust to the heirs at law of her father if he then were deceased; otherwise, to her own heirs at law."

Shortly after the creation of this trust Hetty Sullivan Lawrence married Frederic Cunningham. There were five children of the marriage: four of them, Harriet Cunningham Binney, Constance Cunningham Pertzoff, Frederic Cunningham (Jr.), and Susannah Cunningham Coolidge were born, respectively, in 1885, 1886, 1888 and 1890, and are appellants herein. A fifth child, born in 1892, died in 1923 without issue (R. 22).

The 1891 Trust.

The third trust with which this case is concerned was established under the will of Sarah E. Lawrence, mother of Hetty Sullivan Lawrence (Cunningham) who died May 27, 1891 (R. 18). The Supreme Judicial Court described this trust in these terms (R. 25-26):

"Property was thereby left to pay the income to each of her six children, two of whom are now living, and to the issue per stirpes of any such child deceased, so long as any of the six children should live; and for twenty years after the death of the last survivor, the income

was to be paid to the grandchildren and to their issue per stirpes. The will then provided that each child by will might 'appoint the shares in which' the income given to his or her children and issue 'shall be apportioned among such children and issue,' and might also appoint the proportions in which the principal given to such children and issue 'shall be divided among such children and issue.' "

Hetty Sullivan Lawrence Cunningham (frequently herein called the intestate) died intestate on August 29, 1931.

Development of the Massachusetts Inheritance Tax.

At the time of the creation of each of these three trusts there was no inheritance tax imposed by the law of Massachusetts. The earliest statute imposing such a tax (Acts 1891, chapter 425) applied only to collateral inheritance, and excluded from its operation devolution to lineal descendants.

In 1907 a statute of the Commonwealth was enacted for the first time taxing the testamentary devolution of property to lineal descendants (Acts 1907, chapter 563, effective September 1, 1907; see R. 31). This statute made no mention of powers of appointment. It provided for a rate of tax graduated according to amounts and relationships, but it did not contain any provision for uniting various interests in property, passing or accruing to a single beneficiary from or on account of the death of a decedent, for the purpose of determining the particular rate to be applied. Such a provision for uniting interests was enacted in 1924 (Acts 1924, chapter 128), and was incorporated with the first section of the statute of 1907, as amended, in a single section, which appears in the latest compilation of the Massachusetts statutes—General Laws (Ter. Ed.)—as section 1 of chapter 65. The pertinent parts of this section in its present

form, which was one of the statutes applied by appellee in this case, are as follows:

> "Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth . . . , which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax at the percentage rates fixed by the following table. . . .
>
> [A table of graduated rates here appears.]
>
> "Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.
>
> "All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder."

For the full text of this section see Appendix, p. 43.

The original statute of 1907 expressly excepted from its application the estates of persons who had died prior to its effective date. This exemption has been carried forward in all later amendments, and it now appears in its present form as section 36 of GENERAL LAWS (Ter. Ed.), chapter 65 (see Appendix to this brief, p. 47). The course of this exemption, through its most recent amendment, is traced fully in *Coolidge* v. *Commissioner,* 268 Mass. 443, at pages 446-7, and more concisely in *Coolidge* v. *Long,* 282 U.S. 582, at pages 594-5. It has always been applicable to all interests in property which "passed or accrued upon" the death of Sarah E. Lawrence.

The earliest statute of the Commonwealth purporting to levy a succession tax upon the occasion of both the exercise and non-exercise of powers of appointment was enacted in 1909 (ACTS 1909, chapter 527, section 8). In its present form this statute appears as section 2 of GENERAL LAWS (Ter. Ed.), chapter 65, quoted here in full:

> "Section 2. Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property

to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The date named is the effective date of the 1907 statute (see R. 31), twenty-one months prior to the effective date of this act, which is June 19, 1909.

At no time has the law of the Commonwealth purported to levy a tax on gifts not testamentary in character, unless the construction given these statutes by the Supreme Judicial Court in this case results in such a tax being imposed.

The Taxes Imposed upon the Succession by Intestacy.

When the intestate died in 1931 her four surviving children were her sole next of kin and heirs at law (R. 17). The share of each child in the net amount of her estate being sufficient to bring such share within the third division of graduated rates established by GENERAL LAWS (Ter. Ed.), chapter 65, section 1 (see Appendix, p. 43), taxes were levied and paid with respect to each share in part at a rate of 1 per cent, in part at a rate of 2 per cent, and the remainder at a rate of 4 per cent. The validity of these taxes is not contested.

The Taxes Alleged to be Invalid.

1862 Trust. The appellee at the same time levied a tax upon the interests to which the several heirs at law of the intestate succeeded in the property held by the Massachusetts Hospital Life Insurance Company under the 1862 trust (R. 18). This tax was imposed upon the theory that the intestate had at the time of her death a power of appointment as to the remainder interests in the property, and that, as she had

failed to exercise that power, by GENERAL LAWS (Ter. Ed.), chapter 65, section 2, a disposition of the property should "be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will" of the intestate. Since the respective interests of the heirs at law were each of a value less than the amount specified by section 1 of that chapter as exempt from tax, no tax would have been imposed on any of them had they been assessed separately. The Commissioner, however, applying the last paragraph of section 1, united the interest of each heir at law in this property with his interest in the intestate's net estate for the purpose of fixing the rate of tax, and thereby taxed each interest in the trust at a rate of 4 per cent (R. 18).

1877 Trust. The Commissioner also at this time assessed a 4 per cent tax on the interests of the heirs at law in the property held by the trustees of the 1877 trust, again determining the rate by joining these interests to those received by intestacy. If the respective interests in the property of the 1877 trust had been treated separately they would not have been subject to tax, being within the amount exempted by the statute (R. 17-18).

1891 Trust. The life interests of the intestate's heirs at law under the will of Sarah E. Lawrence had a tax likewise assessed upon them by the Commissioner as of the date of the intestate's death. The valuation placed upon each interest was such that if it was taxable, and taxable separately, the rate of the tax would have been 1 per cent. The Commissioner, however, assessed a 4 per cent tax by joining these interests with those above described (R. 18-19). This tax (see the opinion of the Supreme Judicial Court, R. 30) seems to have been levied under section 2 of chapter 65, GENERAL LAWS (Ter. Ed.), primarily on the ground that the

interests concerned were subject to a special non-exclusive power of appointment in the decedent which she failed to exercise (R. 26, 30).

The Proceedings Below.

Each of the appellants paid his proportionate share of all these taxes assessed by the appellee, and they subsequently filed a petition for an abatement of such taxes in the Probate Court for the County of Norfolk (R. 1-4), pursuant to the second paragraph of section 27 of chapter 65 of the GENERAL LAWS (Ter. Ed.), which is printed in the Appendix, at p. 45. In their petition (R. 1, 3) the appellants claimed each and all of these taxes, excepting those assessed upon the net estate of the intestate, to be illegal and excessive, and the imposition of them to be in violation of the Constitution of the United States of America, in that they deprived the appellants of their property without due process of law and denied them the equal protection of the laws.

The Probate Court, without making any decision, reserved all questions of law presented by the pleadings and an agreed statement of facts for the determination of the Supreme Judicial Court, the highest court of the Commonwealth of Massachusetts. This procedure was in accordance with sections 9 and 13 of chapter 215 of the GENERAL LAWS OF MASSACHUSETTS (Ter. Ed.), the material parts of which are given in the Appendix, pp. 47, 48.

The Contentions of the Appellants.

The appellants have asserted that the application of the statutes by the appellee denied them the equal protection of the laws, deprived them of property without due process of law and impaired the obligation of contracts, and they based these assertions on the following principal contentions:

a) Only interests in property subject to powers created prior to September 1, 1907, are brought within the operation of section 2 of chapter 65, and that section therefore effects an arbitrary and unreasonable discrimination against the appellants, subjecting their interests to a tax which would not have been levied had the powers of appointment concerned been created at any time after that date;

b) The appellants received their interests under and by virtue of instruments made effective, beyond any power of the settlors to alter, amend or revoke, many years before the enactment of the laws sought to be applied, and their rights under those instruments, accruing before the passage of the statutes, could not be impaired by subsequent legislation;

c) The appellants' interests were received from three separate sources and they should not be united for the purpose, first, of making them taxable, and, second, of augmenting the tax; and

d) The failure to exercise a testamentary power of appointment, particularly in the case of a special non-exclusive power, is insufficient to justify the imposition of an excise tax upon successions otherwise fully determined long prior to the enactment of any statute taxing them.

On January 2, 1936, the Supreme Judicial Court sent down a rescript (R. 23), directing that the petition be dismissed, and incorporating by reference an opinion expressly denying the appellants' assertions that the taxes violated the constitutional guarantees of the Fourteenth Amendment, and holding that there was no impairment of the obligation of the contracts involved.

The Probate Court thereupon entered a final decree dismissing the appellants' petition. Under the Massachusetts practice the decree so entered constitutes the final decision of the highest court of the state in which a decision could be had, so that the appeal is taken directly from that decree.

Specification of Errors.

Recognizing that this Court will not review the rulings of a state court as to the construction of the statutes or as to their conformity to the state constitution, the appellants have assigned as errors only those aspects of the decision of the Massachusetts Court which involve Federal questions. The nine assignments of error, all of which are insisted upon (R. 33-37), present in different forms the contention that the statutes, as here construed and applied, are repugnant to the Constitution of the United States—

(1) Because they deny to the appellants the equal protection of the laws;

(2) Because they deprive the appellants of their property without due process of law;

(3) Because they impair the obligation of the contracts contained in the contract of July 24, 1862, the trust indenture of January 26, 1877, and the will of Sarah E. Lawrence.

Summary of Argument.

I. The contention of the appellants that General Laws (Ter. Ed.), chapter 65, sections 1 and 2, as construed, deny to them the equal protection of the laws, is based upon an arbitrary discrimination created by the Massachusetts statutes which affects these appellants adversely. Both the 1862 and 1891 trusts gave testamentary powers of appointment to a life tenant who was not the creator of the trust. The persons succeeding in default of appointment to the remainder interests under the 1862 trust, established *inter vivos*, were taxed on those interests at a rate of 4 per cent whereas, if the trust had been created after September 1, 1907, their interests would not have been taxed at all under either section of the statute. If the 1891 trust had become effective by the death of Mrs. Lawrence after September 1, 1907, the persons succeeding to the remainder interests

under the trust created by her will would have been taxed under section 1 at a rate of 1 per cent as succeeding to property of Mrs. Lawrence. Since Mrs. Lawrence died before that date, however, those interests are taxed at a rate of 4 per cent on the theory that the succession was to property of Mrs. Cunningham. The appellants contend that it is unconstitutionally arbitrary to say in substance that successions alleged to have taken place in 1931 will be taxed at 4 per cent if the trust instrument creating a non-exercised power of appointment was executed and delivered prior to September 1, 1907, and not taxed at all or taxed at a lower rate if the trust was executed and delivered after September 1, 1907 (see *infra*, pp. 15-23).

II. The settlors of these trusts reserved no power to affect the trust property. Whether the remainder interests of the appellants, who are children of Mrs. Cunningham, were technically vested or contingent, these appellants after 1891, when Mrs. Lawrence died, were separated from complete possession of these interests only by two uncertainties, whether they would survive their mother and whether their mother would divert the property from them by exercising her powers of appointment under the 1862 and 1891 trusts. The appellants contend (1) that the fact that these uncertainties were removed after the passage of the tax act is not sufficient to warrant a retrospective tax on the succession (see *infra*, pp. 23-36), and (2) that to tax the mere falling in of remainders due to the non-exercise of the powers of appointment as an exercise of a privilege of succession and on the basis that the property affected was that of the donee of the power (see *infra*, pp. 36-42) violates the due process clause of the Fourteenth Amendment and impairs the trust contracts.

POINTS AND AUTHORITIES.

I. The Statutes as Construed by the Courts below Deny to the Appellants the Equal Protection of the Laws.

Both the 1862 and the 1891 trusts were created by donors other than Mrs. Cunningham, the intestate life tenant to whom was given a power of appointment by will over each trust. The appellants are forced, by GENERAL LAWS (Ter. Ed.), chapter 65, section 1, as construed, to pay a tax upon their succession to interests in the 1862 and 1891 trusts solely because those trusts were created before 1907, while successions to identical trusts created after 1907 would either go untaxed or would be taxed, if at all, at a lower rate as of the death of the creator of the trust and as a part of his property.

If a settlement were made after 1907 by indenture *inter vivos* by S, a settlor, in trust for A for life, remainder as A should by will appoint, and in default thereof to A's children, the succession of the children in default of appointment upon the death of A would not be taxed by the Commonwealth.

(1) It would not be taxed by section 1 of the GENERAL LAWS (Ter. Ed.), chapter 65. That section taxes only property passing by the will or intestacy of a decedent, property passing by way of gift or under indentures created to take effect at the donor's death, and gifts made in contemplation of death (which are deemed to be equivalent to a testamentary disposition by the decedent). The section taxes the succession to such property as passing from the *donor* at *his* death (see as to this *Dexter* v. *Treasurer & Receiver General,* 243 Mass. 523). Section 1 does not purport to tax—

(a) the falling in of remainder interests, created by an indenture *inter vivos,* at the death of a life tenant *other*

than the donor, irrespective of whether or not that life tenant had a power of appointment, or

(b) the exercise or non-exercise of a power of appointment under such an indenture by a life tenant *other than the donor.*

That this is so seems clear from *Emmons* v. *Shaw,* 171 Mass. 410, decided under the old collateral legacy tax (STAT. 1891, chapter 425), which tax, although limited to successions by collateral heirs of a decedent, was in the respects here pertinent similar to section 1 of the present succession tax. It was there held that the statute did not apply to the exercise of a power of appointment in favor of a collateral of a donee of a power who was not also the donor or settlor of the trust under which the power was created.*

(2) Quite plainly section 2 would not tax the transfer under the imaginary trust created after 1907, suggested above, since the scope of section 2 is expressly limited to "any disposition of property made *prior* to September first nineteen hundred and seven." (Italics ours.)

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* This construction of the statute was founded in large measure upon the well-settled doctrine that (although equity sometimes requires that property subject to a general power of appointment exercised by the donee shall be applied to pay the debts of the donee), the general rule is that such property passes at the death of the donee under and by virtue of the original gift or will of the donor. If there is no appointment, the donee of the power has nothing to do with the property at all, and if the power is exercised, this "is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor" (*Emmons* v. *Shaw,* 171 Mass. at page 412). Appointments are "incorporated into the instrument creating the power."

See *Hogarth-Swann* v. *Weed,* 274 Mass. 125, 129, 130.
Cf. *United States* v. *Field,* 255 U.S. 257, 263.
Helvering v. *Grinnell,* 294 U.S. 153.

Under such a settlement as is suggested above, if created after 1907 *by will,* the succession of the appointee or remainderman would be taxed, under section one, at the rate determined by his relationship to the *donor* and not the *donee* of the power, and by aggregation with other property received from the donor.

Therefore, if the 1862 and 1891 trusts *had been created after 1907,* respectively, by deed and by will, it is plain that the successions upon which the Commonwealth has levied this excise would in the case of the 1862 trust go entirely untaxed, and in the case of the 1891 trust would be taxed as a bequest to the appellants from Sarah Lawrence, the donor.

This premise of the appellants may be restated briefly as follows:

Successions to remainders subject to powers of appointment, in default of appointment, under settlements created since 1907 by gift *inter vivos* by donors who are not also the donees of the power of appointment are not taxed under Massachusetts succession tax laws. Successions to remainders in identical settlements created prior to September 1, 1907, are, however, singled out for taxation by section 2 of the statute. As to dispositions by will containing powers of appointment, they are customarily treated as bequests from the original testator to the remainderman, and are taxed as of the death of the original testator if the testator's death occurred subsequent to 1907. Section 2 again picks out such of this class as were created before September 1, 1907, and treats them as bequests from the donee to the remainderman with the result that a different rate of tax is imposed—frequently, as in this case, a higher rate. It is the special and seemingly invidious selection of those dispositions which are peculiar only in that they were created prior to September 1, 1907, that,

the appellants submit, deprives them of the equal protection of the laws.

The general principles of equal protection are well settled.

"That clause does not prohibit classification."

Hart Refineries v. *Harmon,* 278 U.S. 499, 502.

"But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

F. S. Royster Guano Co. v. *Virginia,* 253 U.S. 412, 415.

See *Gulf, Coronado & Santa Fe Ry. Co.* v. *Ellis,* 165 U.S. 150, 155.

See *Stebbins* v. *Riley,* 268 U.S. 137, 142.

"The test to be applied in such cases as the present one is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation?"

Colgate v. *Harvey,* 296 U.S. 404, 423.

Distinctions based upon points of time have been condemned by this Court when found to have no real relation to the tax or regulation involved.

Schlesinger v. *Wisconsin,* 270 U.S. 230.
Heiner v. *Donnan,* 285 U.S. 312.
Mayflower Farms v. *Ten Eyck,* 297 U.S. 266.

The first two cases are complicated by the fact that the attempt there was to relate a gift to the death of the donor

upon grounds which this Court found had no reasonable basis in fact. In the *Schlesinger* case, however, the Court specifically adopted as a premise a proposition which has real bearing on the instant case. It was said, at pages 239-40:

> "The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment."

This statement was repeated in the opinion in *Heiner* v. *Donnan,* 285 U.S. 312, 331 *et seq., supra,* and formed the basis of this Court's decision that the statute there involved was invalid when considered as a gift tax. A recent dictum serves further to emphasize the arbitrary character of such a classification:

> "If the exemption had been made to depend upon the *time* when the loan was made, instead of upon the *locality* where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted."
>
> *Colgate* v. *Harvey,* 296 U.S. 404, 425.

As to the 1862 trust created *inter vivos* by Mrs. Cunningham's father, section 2 as construed operates in substance as a gift tax and, treated as such, is open to the same objections, on the ground that it is arbitrary, that are outlined in the cases cited above.

One case from a state court is almost directly in point and therefore deserves mention. In *Matter of Pell,* 171

N.Y. 48, the Court of Appeals held invalid a tax on the succession to remainder interests vesting before June 30, 1885, and one ground of this decision was that the statute exempted from its operation those remainders where the life estates expired between June 30, 1885, and March 14, 1899. The Court there said, at page 59:

> "The vice of this legislation is that it does not seek to impose a tax on all estates upon remainder, whether created by will or deed, that vested prior to June 30th, 1885, but contains the further provision that the life estate must expire after the passage of the amendment on March 14th, 1899 . . . The tax is, therefore, imposed on a limited class of remaindermen, while others who have come into possession and enjoyment, by reason of the termination of the life estate long after the early date fixed of June 30th, 1885, are not taxed.
>
> "The learned counsel for the appellant states a very apt illustration in his brief as follows: 'We often hear it declared that the legislature may designate watches and carriages as a class of property and subject the same to the payment of duties or taxes, but would any one claim that a law, declaring that all watches or carriages which were purchased prior to June 30th, 1885, should be appraised and taxed, could be sustained upon the ground that such law merely designated a class of property for taxation?'
>
> "Where the statute declares that the owners of a particular class of property, acquired at a particular time, shall be taxed, it is equivalent to naming the owners of such property; it is in no sense a general classification."

These authorities would seem to establish clearly the arbitrary character of the classification now under consideration. In the light of the *Pell* case and the statements

of this Court, referred to above, the appellants submit that section 2 of the Massachusetts act in taxing successions to settlements created before 1907, while exempting in whole or in part successions to those created after 1907, denies to them the equal protection of the laws.

Nor does the date acquire merit as a dividing line by reason of its being the effective date of the statute by which Massachusetts abandoned her former policy of taxing only collateral successions and adopted the present scheme of taxing them all. Upon the adoption of this policy, it was soon borne home upon the legislators that a source of revenue was being neglected, due to the form of section 1 and to the decision of *Emmons* v. *Shaw,* 171 Mass. 410, *supra,* which they might attempt to tap. Section 2 was therefore enacted in its present form in 1909, in order that in those cases where the first shifting of interests had escaped taxation by reason of being beyond the legislative pale, the second might bear the burden. The writers of the statute apparently ignored, if indeed it ever came to their attention, the fact that by this act they were subjecting to the excise trusts long established whose modern counterparts go free.

There is no magic in the effective date of the statute which makes justifiable a classification based thereon of those who otherwise stand in the same relation to the law.

Mayflower Farms v. *Ten Eyck,* 297 U.S. 266, *supra.*
Matter of Pell, 171 N.Y. 48, *supra.*

It is true, of course, that "The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus discriminate between the rights of an earlier and later time."

Sperry & Hutchinson v. *Rhodes,* 220 U.S. 502, 505.

The Court below gave weight to this doctrine in answering appellants' contention on this point (R. 31).

The discrimination here involved, however, is not one whereby acts subsequent to the effective date are taxed and earlier ones are left untouched. Precisely the opposite is attempted, and this seems to the appellants to be entirely whimsical and unjustifiable.

In the *Mayflower* case, *supra*, decided after the Court below had rendered its decision in this case, this Court held that there was no difference between milk distributors already in business when the law was passed and those entering the field later, which justified the granting of a benefit to the former while withholding it from the latter. It may even more confidently be asserted that there is no difference between trusts set up in 1906 and those set up in 1908 which justifies the taxation of the former and the exemption of the latter. From the point of view of taxability of the various shiftings of beneficial interest, there would seem to be no difference between a disposition occurring fifty years ago and one made yesterday. So long as two settlements are equally within the reach of the law when enacted, there would appear to be no reason why one made many years ago should bear a burden, while those created recently bear a lesser load or none at all. It is true that equality in taxation need not be achieved with mathematical exactness—

> *General American Tank Car Corp.* v. *Day*, 270 U.S. 367—

but it is equally true that irrational irregularities, when substantial, will render a law invalid.

> *Gast Realty Co.* v. *Schneider*, 240 U.S. 55.
> *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 416.

It is submitted that the difference in treatment here involved, both as to trusts created by deed and as to those created by will, results in substantial hardship to the beneficiaries of trusts which happen to have originated prior to September 1, 1907, and that this hardship, born of historical accident, is so wholly unnecessary and irrational as to render the law, as here construed and applied, unconstitutional.

II. The Statutes as Construed by the Courts below are Repugnant to the Due Process Clause of the Fourteenth Amendment and Impair the Obligation of the Contracts Embodied in the Agreement dated July 24, 1862, the Indenture of Trust dated January 26, 1877, and the Will of Sarah E. Lawrence.

Section 1 of chapter 65, when applied to the successions under these trusts, places a burden upon the carrying out of contracts which were made long before the statutes were passed, and to that extent it alters their terms. Section 2 of chapter 65 is so drawn that it applies only to successions established before its passage. The appellants contend that this retrospective operation of either section, or both together, is so arbitrary and unreasonable as to constitute a violation of the guarantees of the Fourteenth Amendment and an impairment of the obligation of contracts.

The retrospective application of excise tax statutes has frequently been held by this Court to be unconstitutional.

Blodgett v. *Holden*, 275 U.S. 142.
Untermyer v. *Anderson*, 276 U.S. 440.
Nichols v. *Coolidge*, 274 U.S. 531.
Coolidge v. *Long*, 282 U.S. 582.

In certain situations, however, retrospective application of excise taxes is neither arbitrary nor unreasonable. These situations are well illustrated by recent decisions of this

Court, and the cases serve to mark out the territory where retrospective operation is permissible.

(1) It is, for instance, not unfair to levy an excise when the person whose exercise of a privilege was taxed "was forewarned at the time he elected to exercise the privilege" that an excise would be imposed. The warning may be given by a prior statute, in force at the time of the exercise.

Milliken v. *United States*, 283 U.S. 15, 24.
Phillips v. *Dime Trust & Safe Deposit Company*, 284 U.S. 160, 166-7.

(2) If an attempt is made to avoid a tax by use of some legal device, which changes the form without essentially affecting the substance, the tax will be extended to embrace the attempted evasion, and a claim that the statute acts retrospectively will be unavailing.

Porter v. *Commissioner*, 288 U.S. 436.

This case involved the application of the Federal estate tax to property transferred in trust by the decedent before his death. The settlor reserved full power to alter or modify the terms of the trusts in any manner he saw fit, except in his own favor. The Court held that the property should be included in his gross estate, as the arrangement might reasonably be deemed "a substitute for testamentary disposition."

(3) Similar in character are the cases where a property owner, either to evade a tax, or for other reasons, has deprived himself or been deprived of part or all of his interest in certain property, but only for the time being, with the possibility or power of recalling that interest and enjoying it fully in his own right. There are included in this group the numerous instances of revocable trusts.

A gift of property upon trust, when the trust by its terms can be revoked at the will of the settlor, is of course no complete gift at all.

Reinecke v. *Northern Trust Co.*, 278 U.S. 339.
Bullen v. *Wisconsin*, 240 U.S. 625.
Corliss v. *Bowers*, 281 U.S. 376.

In such cases retroactivity is immaterial.

When, however, the power to revoke is qualified, say, by requiring the concurrence of some third person or persons, a tax levy by virtue of a statute subsequently enacted is on more doubtful ground, and its constitutional validity may depend upon the status of the persons whose concurrence is necessary, for as a practical matter this, taken with any interest expressly reserved to the settlor, may determine the amount of control which the settlor has retained. The greater the measure of that control, the less final is the disposition and the less question there can be of the tax violating a constitutional guarantee.

It has been decided that where the settlor reserves the income of the property to himself for life at his option, and the concurrence of any one of several trustees is all that is required if he wishes to terminate the trust or alter it in any particular, the transfer is sufficiently incomplete to render the property susceptible to a succession tax imposed by a later-enacted statute.

Saltonstall v. *Saltonstall*, 276 U.S. 260.

This decision concerns the statutes here in question, and it was relied upon to a considerable extent by the Supreme Judicial Court in sustaining the taxes to which the appellants object (R. 29, 30). It involves, however, different facts and a different theory.

The decedent in the *Saltonstall* case was the settlor of the trust. He reserved the option of receiving the income for his own use. The only practical distinction marking off the corpus of the trust from all other property that was his by outright ownership was the necessity of securing the assent of a single trustee before making inroads upon or changing the disposition of the principal. This may be considered as not a very substantial distinction, where all the trustees have been selected by the settlor, are responsible to him as a present beneficiary and are not restricted by any given standard for assent or non-assent. The trust was, in fact, three times modified; the last modification provided for the accumulation of the income thereafter, thus diminishing the settlor's interest, but this provision was made ten years after the enactment of the statute and less than three months before the settlor's death.

With the exception of the requirement of a trustee's assent for modification, *Saltonstall* v. *Saltonstall* presents the same situation as that in *Bullen* v. *Wisconsin*, 240 U.S. 625, in which the trust was held to be properly considered the equivalent of a fee in the settlor, for purposes of the Wisconsin inheritance tax. The decision in *Reinecke* v. *Smith*, 289 U.S. 172, holds that a trust subject to a revocation provision like that in the *Saltonstall* case, but under which the settlor retained no interest whatever in the income, was sufficiently his own property to make him personally responsible for the tax upon the income of the trust so long as he retained the power to revoke.

It is apparent that the *Saltonstall* case is merely consistent with well-established authority. But upon going one step beyond it, to the situation where the decedent's power over the trust is diminished by the necessity of his obtaining the consent of a beneficiary to its revocation, serious constitutional doubts arise about the *retrospective* application of a statute purporting to tax the testamentary

succession, which was passed before the decedent's death, but after the establishment of the trust.

Reinecke v. *Northern Trust Co.*, 278 U.S. 339, *supra*, at pp. 345-6, 348-9.
Cf. *Helvering* v. *City Bank Co.*, 296 U.S. 85, 88, 91.

If the next step be taken towards freeing the trust from the settlor's control, and the assent of all beneficiaries or action of all trustees is required to terminate the trust, then an attempt to levy a tax upon the testamentary transfer by a statute enacted *after* the creation of the trust but before the decedent's death violates the due process clause of the Fifth Amendment.

Helvering v. *Helmholz*, 296 U.S. 93, 97-98.
See *White* v. *Poor*, 296 U.S. 98, 102.

The cases which have been discussed demonstrate more effectively than any argument the criteria by which the element of arbitrary retrospectivity or retroactivity in the operation of excise tax statutes is determined. A statute may be retrospective or retroactive without being arbitrary if a) the person concerned received adequate warning that a tax will be imposed, or b) he is employing a substitute for a taxable subject, calculated to evade the tax, or c) his exercise of the privilege is subject to a power of recall; and to these should be added the further qualification that if he can in any normal manner escape the tax, after the statute's enactment, its retrospective application as to him cannot be considered unfair.

See *Porter* v. *Commissioner*, 60 F. (2d) 673, 675.

It is contended that, measured against these principles, the retrospective operation of sections 1 and 2 of chapter

65, as applied by the Court below, is arbitrary and invalid.

(1) In all three trusts, the settlors obviously had no knowledge of the prospective imposition of the taxes here involved.

(2) In the 1862 trust there was clearly no substitute for a testamentary disposition by the settlor, for he parted with all interest at once and reserved no control over it beyond 1875, when his daughter became of age. The 1891 trust was created by a will which took effect sixteen years before the enactment of any applicable tax. The provisions of the 1877 trust governing the transmission of the trust property were settled finally when the trust was executed. Nothing in the trust instrument gave the settlor any power to control what persons would take at the end of her life interest.

(3) In none of the trusts could the settlors look forward to the return to them of the property placed in trust.

(4) It was impossible to escape the tax, as the statutes are construed by the Court below. They would apply, no matter when the remainders fell in, or who was entitled, whether the powers were exercised or not exercised.

Any contention that the tax was not unfairly retroactive must rest either on the argument that the remainders involved were technically contingent rather than vested, or, in the instances of the 1862 and 1891 trusts, on the fact that the intestate had powers of appointment which she did not exercise. It is submitted that neither of the reasons advanced is sufficient to prevent the application of the statute to the successions under the three trusts from being so arbitrarily retroactive as to violate constitutional guarantees.

With respect to the tax as levied on each succession the case of *Coolidge* v. *Long*, 282 U.S. 582, is of great significance. That case concerned a trust established after the

enactment of the 1907 statute (Acts 1907, c. 563; now, as amended, General Laws (Ter. Ed.), chapter 65, section 1) but five weeks before its effective date. The terms of the trust reserved its income to the settlors during their lives, and provided that upon the death of the survivor the principal was to be divided among the settlors' five sons, with the further provision, however, that if any of the sons should predecease the settlors, his share should go to those entitled to take his intestate property by the law in force at the time of distribution. About ten years later the settlors assigned their interest in the trust to their sons, all of whom eventually survived the trust's termination. Upon the death of the survivor of the settlors the Commissioner taxed the succession of the beneficiaries to the property by virtue of the 1907 statute (then General Laws chapter 65, section 1). The Supreme Judicial Court sustained the validity of the tax, holding that full title did not vest in the remaindermen until the surviving settlor died, and that the succession which took place at that time was the proper subject of a tax (*Coolidge* v. *Commissioner of Corporations & Taxation,* 268 Mass. 443, 451).

Upon appeal to this Court, the decision was reversed. It was held that the right to possession and enjoyment had fully vested prior to the enactment and consequently could not be reached by the tax. This Court said (282 U.S. 597-8):

> "The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. *Coolidge* v. *Loring, supra,* 223.* Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right

* 235 Mass. 220.

in the remaindermen. *Knowlton* v. *Moore*, 178 U.S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth. While the sons if occasion should arise might by appropriate suit require the trustees to account, it is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds. *Barnitz* v. *Beverly*, 163 U.S. 118, and cases cited."

The principles set forth appear to apply with equal force to the succession under all three of the trusts involved in the case at bar. By every standard to which that quotation refers the taxes here in question appear to be invalid.

The trust established in 1877 presents a situation which in substance, although admittedly not in form, is the same as that found in *Coolidge* v. *Long*.

Considerable space is devoted by the Supreme Judicial Court in its opinion to distinguishing the succession under this trust from that involved in the *Coolidge* case (R. 27-29). The opinion relies upon the fact that in *Coolidge* v. *Long* the remainder was *vested* subject to divestment in the event that the sons of the settlors failed to survive

them, whereas in this instance the remainder interest of the children of Mrs. Cunningham was *contingent* upon their surviving her, a distinction which is only technical in nature, as the practical result in each case was identical. The surviving children in each instance were to obtain the property, and did in fact obtain it. The distinction which the Supreme Judicial Court makes has been dismissed by the courts of New York (dealing with a case under a similar statute in the same circumstances), as being without merit.

Matter of Craig, 97 App. Div. 289, 89 N.Y. Supp. 971; affirmed, 181 N.Y. 551.

In re Smith, 150 App. Div. 805, 135 N.Y. Supp. 240.

In re Wall's Estate, 138 Misc. 213, 245 N.Y. Supp. 310.

In the case first cited the Court said (97 App. Div. at pp. 291-2):

> "It seems to me to be immaterial to consider whether the remainders created by the trust instrument to which the appellants have now become entitled are to be regarded as vested or contingent . . . The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer regarded either as a transfer then made or contemplated in the future, and that subsequent legislation imposing such a tax must be deemed unconstitutional as in effect the taking of private property for public use without compensation or as impairing the obligation of a contract."

The Court continues (on page 293):

> "In considering the question the word 'vested' as used in the above [*Matter of Pell*, 171 N.Y. 48] and many other opinions is really to be construed as equivalent to the word 'accrued' and not as distinguished from merely contingent interests. In that sense a property right which has been fully acquired is protected by the contract and becomes in law a *vested* right, the enjoyment of which is not to be deemed as only a privilege and as such consequently subject to taxation upon the right of enjoyment."

A similar opinion is expressed in—

Matter of Vanderbilt, 172 N.Y. 69, 73.

In judging the effect of retrospective statutes upon contracts already made and successions already determined, to see whether the application is so arbitrary and unfair as to violate constitutional provisions, the decision must turn upon the question whether or not actual property rights are affected. The considerations are practical rather than theoretical, and from a practical viewpoint there is no difference between contingent remainders and vested remainders subject to divestment, when both depend upon the same event.

As the rules of vested and contingent remainders have been developed out of special conditions in the law of real property and have no connection, either logical or historical, with the question of the retrospective application of statutes, the appellants contend that the rule stated in these New York cases is both practical and reasonable, and should be applied. The doctrine of *Coolidge* v. *Long*, it is submitted, should not be limited to cases where the remainders involved are technically vested in the historical sense.

So far as the succession under the terms of the 1862 trust is concerned, the rule of *Coolidge* v. *Long* is directly applicable in its technical as well as its practical aspects. The only factor adverted to by the Court as preventing the succession by the appellants to their remainder interests under this trust from being complete (R. 29), was the presence of Mrs. Cunningham's power of appointment. The remainder interests here were limited to a class, and as such vested as soon as the first member of the class was born, subject to being opened to admit later-born members up to the time fixed for distribution.

Minot v. *Purrington*, 190 Mass. 336, 338.
Richardson v. *Warfield*, 252 Mass. 518, 522.

In fact every member of the class who was to take was born by 1890 (R. 22), so that not only the remainder as a whole was vested, but the individual interests were determined before the enactment of the tax, except in so far as they may have been slightly altered by the birth and death of one other member who did not survive the intestate.

At the time when the taxing statutes were enacted, therefore, it is clear that the only uncertainty affecting the appellants' remainder interests under the 1862 trust was the fact that they were subject to powers of appointment. It is settled law that, in the absence of other factors, remainders limited upon failure to exercise a power of appointment are vested remainders subject to divestment.

Moore v. *Weaver*, 16 Gray, 305.
Whipple v. *Fairchild*, 139 Mass. 262.
Doe dem. Willis v. *Martin*, 4 Term Rep. 39.
Sugden, Powers (8th ed.), 452.
Farwell, Powers (3d ed.), 310.

The same case, therefore, is presented by the successions under the 1862 trust as was before this Court in *Coolidge*

v. *Long;* vested remainders subject to divestment are sought to be taxed at the time the possibility of divestment ceases. It is submitted that this is invalid under the controlling authority of that decision. (See discussion of effect of Mrs. Cunningham's power of appointment, *infra,* pp. 36-40.)

The 1891 trust in this respect varies from the 1862 trust, if at all, in the fact that the particular remainder interest with which this case is concerned is a life interest in income to "the issue then living, of every one of my said six children then deceased (such issue of every deceased child taking one share according to the stocks)" (R. 10-11). The Supreme Judicial Court in discussing this remainder referred to it as contingent, but the only contingent aspects mentioned were those inherent in any life estate following another life interest (R. 29-30), and the Court appears to have rested its decision primarily, if not entirely, upon the presence of the unexercised power (R. 30). Apart from the questions with respect to this power, it is submitted—

(a) that if the appellants' remainder interests were technically vested in 1891, when the trust took effect and the appellants were all alive, the 1891 trust stands absolutely on the same basis as the 1862 trust; and

(b) that if the appellants' remainder interests are held to be technically contingent, the arguments as to the insubstantial difference between remainders technically vested and contingent remainder interests made with respect to the 1877 trust are applicable (see *supra,* pp. 30-32).

Any contention that the existence of these unexercised powers in a person other than the settlor of the trusts is sufficient to render the successions taxable must rest largely on the decision in *Saltonstall* v. *Saltonstall,* 276 U.S. 260. That case has been discussed above (*supra,* pp. 25-26). It was a case in which complete power to alter and terminate was reserved by the settlor of a trust, with

the consent of a trustee, which as a practical matter left the settlor in a position to control the disposition of the trust property as long as he lived and retained the power. It was held, largely on the authority of *Bullen* v. *Wisconsin*, 240 U.S. 625, that the privilege of succession could not be said to be fully exercised until the settlor's death, and that the imposition of the excise was not a retroactive imposition on a succession already complete.

The powers of appointment in the 1862 and 1891 trusts were not reserved in whole or in part to the settlors. Obviously, after Mrs. Lawrence's death in 1891, when her will became effective, she had no power to alter the disposition of the trust property. The settlor of the 1862 trust relinquished all control (except during the minority of the life tenant) upon the execution of the instrument. This, it is submitted, is a substantial difference of fact which makes the *Saltonstall* case inapplicable.

In the opinion in that case there also occurs, however, the following sentence (p. 271):

> "The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another."

It appears likely that these words have reference to the fact that it was immaterial that the settlor needed to obtain the consent of a probably acquiescent trustee to revoke the trust. If that is not the construction of this statement, the language was broader than the necessities of the case under consideration. In any event, it is the appellants' contention that it is not the acquisition of the *property* which is the subject of a succession tax, but the acquisition of the *right to the property*, by virtue of which the property itself would be received when the time for possession and enjoyment should arrive. This, it is sub-

mitted, was the decisive principle in *Coolidge* v. *Long*, in which case it was said (p. 600):

> "This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment."

Obviously the *right to the property* was acquired by Mrs. Cunningham's children, here appellants, and had accrued to them (subject to the exercise of the powers) in the case of the 1862 trust, at their birth, and, in the case of the 1891 trust, upon Mrs. Lawrence's death, after these appellants had all been born (R. 22). Whether that right was technically vested or contingent, it is submitted, is immaterial.

To support the imposition of an excise tax there must be an exercise of some privilege which the state may grant or withhold.

Knowlton v. *Moore*, 178 U.S. 41, 56.

Since the Massachusetts tax is imposed upon the exercise of the privilege of succession to the property, some such exercise must be found to have occurred at the time of the intestate's death. The Supreme Judicial Court purports to find that exercise occasioned by the lapse of the powers of appointment (R. 29), citing certain earlier decisions of that Court (*e.g. Minot* v. *Treasurer & Receiver General*, 207 Mass. 588, 592-3; cf. *Burnham* v. *Treasurer & Receiver General*, 212 Mass. 165). It is submitted that this decision disregards the true nature of the situation.

It is apparent that the privilege of succession and the privilege of transmission are correlative. An exercise of one implies an exercise of the other. If, therefore, the privi-

lege of succession has been exercised by the death of the donee, he having failed to exercise the power of appointment, it would seem that there must have been at the same moment a transmission of the interests taxed.

In neither the 1862 trust nor the 1891 trust had the settlor had any connection whatsoever with the trust or the trust property for many years before the enactment of the statutes in 1907 and 1909. It is apparent that any transmission from the settlors must have taken place before 1907. It is likewise true that the property has not been held by the state since that time, as it would be in the case of an estate in process of administration.

Cf. *Cahen* v. *Brewster,* 203 U.S. 543.

As was said in *Coolidge* v. *Long,* at page 598:

> "It is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds."

If any transmission is to be found, therefore, it must have been on the part of the donee of the power.

The authorities are unanimous that the donee of a power, particularly one who does not exercise his power, has nothing to transmit. He has by virtue of the power no interest whatever in the property subject to the power that he holds. All that he has is a chance to divert the succession of the remainders from the course which they will follow if he does not act.

The relation of a donee to the property over which he has a power of appointment has been repeatedly stated.

United States v. *Field,* 255 U.S. 257, 263.

> "When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property."

Shattuck v. *Burrage*, 229 Mass. 448, 451.

That the property subject to the power is not the property of the donee clearly appears where a state having jurisdiction of the donee, but not of the donor or his estate, attempts to levy a tax upon the occasion of the power's exercise. Since the power was created elsewhere, such a tax is repugnant to the Fourteenth Amendment.

Wachovia Bank v. *Doughton*, 272 U.S. 567.

In the case where an appointment *is exercised* the donee in a sense makes the property his own and exercises domination over it. By so doing he may render the property subject in equity to his own debts, although if he had not exercised the power, his creditors could not reach it.

Shattuck v. *Burrage*, at page 451.

Thus when the donee of the power intervenes by positive action to designate and choose the channels of succession, it is not unfair to find in some degree a transmission from him. Those who had nothing before, either in enjoyment or in expectancy, now have interests in the property. Such a material change is a proper subject for a tax.

Orr v. *Gilman*, 183 U.S. 278.

Chanler v. *Kelsey*, 205 U.S. 466:

As was said in the latter case (page 474):

> "The plaintiffs in error are not in *without* the exercise of the power by the will of Mrs. Delano [the donee]."

In the present instance the children of Mrs. Cunningham are in without the donee's intervention. It would seem unreasonable to hold non-action an exercise of a privilege of transmission, or the receipt on the part of a beneficiary of an interest which comes to him as the result of another's failure to disturb existing trust limitations an exercise of the privilege of succession. The interest to which he succeeds has ripened and come into possession and enjoyment by reason of its own maturity, without the assistance of any act.

Taxing the non-exercise of a power of appointment in the same manner as its affirmative exercise has been held to be so unfair and arbitrary as to violate the Fourteenth Amendment.

In *Matter of Lansing,* 182 N.Y. 238, the Court of Appeals of New York considered the validity of a tax levied by virtue of the New York Transfer Tax Act (which was very similar to GENERAL LAWS (Ter. Ed.), chapter 65, section 2) upon the exercise of a power of appointment created before the enactment of the tax statute. The exercise had been in favor of the same persons who would have taken the property, in the same proportions, in default of exercise. The Court held the exercise of the power was not effective, and that the remaindermen could choose to take the property by virtue of the good title to it which they possessed by the terms of the original will creating the power. *Matter of Lansing* has been recently approved on this point by this court (*Helvering* v. *Grinnell,* 294 U.S. 153, 156). The Court of Appeals in the *Lansing* case, however, was also required to rule upon that part of the statute purporting to tax non-exercise in much the same terms as those employed by GENERAL LAWS (Ter. Ed.), chapter 65, section 2 (at page 247):

> "We pass without serious discussion that part of the statute which provides, in substance, that the fail-

ure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and had devised it by will. (L. 1897, ch. 284, §220, subd. 5.) Where there is no transfer there is no tax and a transfer made before the passage of the act relating to taxable transfers is not affected by it, because as we held in the *Pell* case such an act imposes no direct tax and is unconstitutional since it diminishes the value of vested estates, impairs the obligation of contracts and takes private property for public use without compensation. (*Matter of Pell*, 171 N.Y. 48; *Matter of Delano*, 176 N.Y. 486, 495.)"

Matter of Pell has been referred to earlier in this brief (pp. 19-21). *Matter of Delano* is the case in which the decision of the Court of Appeals was sustained by this Court in *Chanler* v. *Kelsey*, 205 U.S. 466. The New York court in that case had sustained the imposition of a tax upon the occasion of the *exercise* of the power, but its opinion contained this statement (page 495):

> "If the power had not been exercised, the question would have resembled that presented by the *Pell* case, relied upon below, where we held that a statute was unconstitutional which imposed a tax upon such remainders, already vested and non-defeasible, as should result in an absolute title after the passage of the act. (*Matter of Pell*, 171 N.Y. 48.) In that case the transfer was completed without the aid of a will and the effect was the same as a deed *inter vivos*. There was no foundation for a succession tax, which is a charge upon the right to make a will, or on the right to inherit without a will."

The Arbitrary Measure of the Tax.

The appellants also submit that there is no justification for taxing as a transmission *from the donee of the power* the vesting in possession and enjoyment of property passing in default of appointment.

This being so, the action of the appellee, the Commissioner of Corporations and Taxation, in uniting for the purpose of taxation the several interests passing under the 1862 and 1891 trusts with the general estate of the intestate Mrs. Cunningham and with each other (R. 17-18, 30-31) is clearly arbitrary. The right to the property coming to Mrs. Cunningham's children under the 1862 trust came to them from Amos A. Lawrence, that under the 1891 trust from Sarah E. Lawrence, and that under the 1877 trust from Mrs. Cunningham, the intestate, in every instance by trust limitations effective long before the taxing act. To measure the privilege of succeeding to each of these separate gifts from separate sources cumulatively and at a graduated rate based not on the amount of each gift, but on the amount of the aggregate of these gifts and of the intestate's estate, is in substance measuring the tax on the right to succeed to one person's property in part by the value of the privilege of succeeding to another person's property. This is the type of arbitrary action which has been expressly condemned in *Hoeper* v. *Tax Commissioner*, 284 U.S. 206, in which case it was said (page 215):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment."

The application of the statute here made by the Court below seems no less arbitrary. This is not a case where taxing the successions to the remainder interests passing under the 1862 trust and the 1891 trust separately, assuming they are taxable at all, is necessary to prevent an evasion of taxation by a single settlor. Cf. *Pratt* v. *Dean*, 246 Mass. 300, 309. It is a case where property moves from separate settlors to the same beneficiaries. The taxation of those successions as an aggregate results in a higher tax than if they are taxed separately. The appellants may thus properly contend that arbitrarily treating the successions under the trusts of 1862 and 1891 as if the property were all that of the intestate deprives them of property without due process of law.

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APPENDIX.

Massachusetts Statutes.

General Laws (Ter. Ed.), Chapter 65, Section 1:

"All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate or any interest therein and all tangible personal property within the commonwealth belonging to persons who are not inhabitants of the commonwealth except such an interest in such real estate as is represented by a mortgage or by a transferable certificate of participation or share of an association, partnership or trust, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

[Table of rates quoted only to extent here pertinent.]

Relationship of Beneficiary to Deceased.	Rate Per Centum of Tax on Value of Property or Interest.			
	On Value not over $10,000.	On Excess above $10,000, not over $25,000.	On Excess above $25,000, not over $50,000.	On Excess above $50,000, not over $250,000.
Class A.				
Husband, wife, father, mother; child, adopted child, adoptive parent, grandchild, ...	1%	1%	2%	4%
Class B.				
Lineal ancestor, except father or mother; lineal descendant, except child or grandchild; lineal descendant of adopted child; lineal ancestor of adoptive parent; wife or widow of a son; husband of a daughter, ..	1%	2%	4%	5%

"Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

"All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder."

General Laws (Ter. Ed.), Chapter 65, Section 2:

"Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

General Laws (Ter. Ed.), Chapter 65, Section 27:

"The commissioner shall determine the amount of tax due and payable upon any estate or part thereof and shall certify the amount so due and payable to the persons by whom the tax is payable. Such determination and certification may be made upon account of the tax payable upon the estate generally or upon account or in full for any part thereof or any interest therein. Payment of the amount so certified upon account shall be a discharge of the tax pro tanto and upon subsequent determination and certification of the full amount of the tax payable upon the estate generally or upon any interest therein or part

thereof, payment of the full amount of said tax shall, except as hereinafter provided, be a discharge of the tax, and if upon such final certification it shall appear that any payments made on account are in excess of the tax in full as so determined, the commissioner shall, upon application duly made within six months from the date when the final certificate shall have been issued, issue a certificate that the applicant is entitled to have such excess refunded and the state treasurer shall without any appropriation therefor by the general court pay the amount so certified. In determining the amount of any tax under this chapter, the commissioner shall not be required to consider any payments on account of debts or expenses of administration which have not been allowed by the probate court having jurisdiction of said estate. If after determination and certification of the full amount of the tax upon an estate or any interest therein or part thereof the estate shall receive or become entitled to property in addition to that shown in the inventory or disclosed to the commissioner at or before the time of the certification of the tax in full, the executor, administrator, trustee or other fiduciary shall forthwith notify the commissioner who shall upon being thus or otherwise informed determine the amount of additional tax, if any, due and payable thereon and shall certify the said amount to the person by whom such tax is payable, which amount shall be due and payable thirty days from the date of the certification; provided, that a fiduciary shall be personally liable to pay only so much of said additional tax as is computed on the additional property actually received by him and that a beneficiary receiving any part of such additional property shall be liable to pay so much of the tax thereon as is not chargeable as aforesaid to a fiduciary.

An executor, administrator, trustee, grantee, donee, survivor or beneficiary aggrieved by any determination of the commissioner may, within one year after the payment of

any such tax, apply by a petition in equity to the probate court having jurisdiction of the estate of the decedent for the abatement of the tax or any part thereof, and if the court adjudges that the tax or any part thereof was wrongly exacted it shall order an abatement of such part thereof as was assessed without authority of law. Upon a final decision ordering an abatement of any part of such a tax, the treasurer shall pay the amount adjudged to have been illegally exacted, with interest, without any further appropriation therefor by the general court."

General Laws (Ter. Ed.), Chapter 65, Section 36:

"This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty, and as to all property and interests therein passing or accruing upon the death of persons who have died prior to said date the laws theretofore applicable shall remain in force; but so much of this chapter as relates to property or interests therein passing by deed, grant or gift completed inter vivos in contemplation of death shall apply only to such deeds, grants or gifts made on or after May twenty-seventh, nineteen hundred and twenty."

General Laws (Ter. Ed.), Chapter 215, Section 9:

"A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction."

General Laws (Ter. Ed.), Chapter 215, Section 13:

"A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all questions of law therein for consideration of the full court, and thereupon like proceedings shall be had as upon appeal. And if, upon making an interlocutory decree or order, he is of opinion that it so affects the merits of the controversy that the matter ought, before further proceedings, to be determined by the full court, he may report the question for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties."